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## How Existing Procedures Shape Alternatives: The Case of Grievance Mediation

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# HOW EXISTING PROCEDURES SHAPE ALTERNATIVES: THE CASE OF GRIEVANCE MEDIATION

Deborah M. Kolb\*

I. INTRODUCTION . . . . .	59
II. STUDYING THE MEDIATION PROCESS . . . . .	61
III. MEDIATION AND DISPUTE PROCESSING CHANNELS: THE CASE OF GRIEVANCES . . . . .	67
IV. GRIEVANCE PROCEDURES . . . . .	69
V. MEDIATING GRIEVANCES: STEPS IN THE PROCESS . . . . .	75
A. <i>Case #1: Above the Pothead</i> . . . . .	76
B. <i>Case #2: Safety in the Mines</i> . . . . .	82
VI. COMMENT AND CONCLUSION . . . . .	85

## I. INTRODUCTION

Mediation is one of the oldest and most ubiquitous forms of conflict resolution in American society and throughout the world. Traditionally a prominent adjunct to labor and international negotiation, mediation is now used in divorce, family, civil, consumer, commercial and employee relations, environmental planning and siting, and the development of governmental procedures and regulations.<sup>1</sup> As mediation has penetrated into these new

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1. See D. MCGILLIS & J. MULLEN, NEIGHBORHOOD JUSTICE CENTERS: AN ANALYSIS OF POTENTIAL MODELS (1977); G. BINGHAM, RESOLVING ENVIRONMENTAL DISPUTES: A DECADE OF EXPERIENCE (1984); S. GOLDBERG, E. GREEN, & F. SANDER, DISPUTE RESOLUTION (1985); ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, SOURCEBOOK: FEDERAL AGENCY USE OF ALTERNATIVE MEANS OF DISPUTE RESOLUTION (1987); L. SUSSKIND & J. CRUIKSHANK, BREAKING THE IMPASSE: CONSENSUAL APPROACHES TO RESOLVING PUBLIC DISPUTES (1987); W. URY, J. BRETT & S. GOLDBERG, GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT (1988).

areas of social life, curiosity about the practice of mediation, that is, what mediators actually do to bring about settlement, has increased.

Mediation has always been something of a mysterious art. Behind closed doors, skilled individuals somehow manage to extract compromise from people who disagree about intense and important matters. But within the field of practitioners and the scholars who follow their work, there is little consensus about the ways mediation is practiced and whether it is possible to describe adequately what mediators do to bring about settlement.

It is usually described as a specific form of dispute resolution that is distinguished by a general set of activities and stance of the mediator. As one noted practitioner defines it, "[m]ediation is the intervention into a dispute or negotiation by an acceptable, impartial, and neutral third party who has no authoritative decision-making power to assist disputing parties in voluntarily reaching their own mutually acceptable settlement of issues in dispute."<sup>2</sup> Its steps and stages include at least some attention to (and techniques for) agenda setting, defining and learning about issues in dispute, exploring interests and priorities of the parties, generating ideas, options, suggestions, and/or recommendations for settlement.<sup>3</sup> What we call mediation and the steps of the process we are encouraged to follow are meant to apply to situations as widely divergent as disputes over child care and support to mortality and reproduction rates of fish populations in environmental disputes and release of hostages in the international arena.

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2. C. MOORE, *THE MEDIATION PROCESS, PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* 14 (1986). Several of these defining characteristics of mediation have been the subject of some debate. While some support the concept of mediator neutrality as a fundamental principle of mediation, others suggest that there may be other considerations, such as the fairness of the agreement, that may be more important. See Stulberg, *The Theory and Practice of Mediation: A Reply to Professor Susskind*, 6 VT. L. REV. 85, 86-87, 89-90, 117 (1981); see also Susskind, *Environmental Mediation and the Accountability Problem*, 6 VT. L. REV. 1, 14, 16-18, 46-47 (1981). Studies of mediation in certain international disputes find that it is the very fact that the mediator is interested, and not neutral, that results in effective peacemaking. See Zartman & Touval, *International Mediation: Conflict Resolution & Power Politics*, 41 J. SOC. ISSUES 27 (1985). The voluntary character of mediation has also been questioned. While it is true that parties to mediation always have presumed the right not to agree in mediation, there are potentially coercive characteristics of the dispute-processing institution in which mediation is located that might mitigate the presumption of voluntariness. Users of the lower court often have little choice about whether to mediate or not, about where and when the process will take place, and the options available to them should agreement not be reached. These constraints on choice, which are part of the institutional context of mediation, impinge on the parties' perceptions of how voluntary this process really is. Merry, *Disputing Without Culture*, 100 HARV. L. REV. 2059, 2065 (1987) (review of S. Goldberg, E. Green & F. Sander, *supra* note 1).

3. See generally W. MAGGIOLO, *TECHNIQUES OF MEDIATION IN LABOR DISPUTES* (1971); J. FOLBERG & A. TAYLOR, *MEDIATION* (1984); C. MOORE, *supra* note 2; W. SIMKIN & N. FIDANDIS, *MEDIATION AND THE DYNAMICS OF COLLECTIVE BARGAINING* (1986); L. SUSSKIND & J. CRUIKSHANK, *supra* note 1.

What has been missing from most of our efforts to describe (and prescribe) mediation practice is a consideration of how the context in which mediation occurs impacts the process and leads to varied principles of practice.

A group of mediation scholars have been working together to explore mediation practice in four major fields: public policy decision making; settlement of conflicts between intimates; disputes that arise in connection with commercial transactions; and conflicts that occur in employment relationships.<sup>4</sup> The focus of the study is on the practice of exemplary mediators in these fields, the way they frame<sup>5</sup> and understand the disputes they become involved with and how this shapes their strategic repertoire. What we are finding is that at one level mediation can be described as a common process across settings, but that the more we delve into the specifics of practice, we find some striking differences across fields. It appears that mediation is indeed a chameleon-like process; how it is practiced relates to the institutional setting in which it occurs. If mediation is assisted negotiation, the forms that the negotiation takes prior to mediation influences the ways issues are framed and relationships cast. Further, if parties do not settle in mediation, they have other options, and so perceptions of these alternatives affect their understanding of what happens in mediation. These temporal and spatial dimensions of mediation shape not only the understandings the parties bring to the process, but are also resources the mediator mobilizes strategically in the service of a settlement.

## II. STUDYING THE MEDIATION PROCESS

The study of mediation has proceeded from several directions, most of which downplay variation in the way mediation is practiced. Working from a legal model of disputes, some scholars focus on the formal attributes of

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4. My colleagues on this project are John Forester, Lavinia Hall, Christine Harrington, Kenneth Kressel, Sally Merry, William O'Barr, Thomas Princen, Austin Sarat, and Susan Silbey.

5. Frames are the interpretive schemes mediators use to explain, make sense of, and organize their work. See E. GOFFMAN, *FRAME ANALYSIS* (1974); T. SCHEFF, *BEING MENTALLY ILL: A SOCIOLOGICAL THEORY* (1984); strategies are defined as the decision making rules and pattern of techniques for managing the mediation process. Within a social context that presents various opportunities and constraints, mediators play pivotal roles in structuring and shaping the process. A focus on mediator practice joins the normative and behavioral aspects of mediation by studying observable behavior in order to discover the norms that produce coherent or consistent action. See generally A. MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* (1981); P. BOURDIEU, *OUTLINE OF A THEORY OF PRACTICE* (1977); D. SCHON, *THE REFLECTIVE PRACTITIONER* (1983); SILBEY, *Ideals and Practices in the Study of Law*, IX *LEGAL STUD. F.* 7 (1985). This approach focuses upon the mediator's processes of meaning making.

dispute resolution procedures.<sup>6</sup> Much of this research describes mediation as a singular process of dispute resolution that is distinguishable from other forms and suited to particular kinds of conflict.<sup>7</sup> Scholarship on dispute resolution procedures has opened and rationalized the field, yet in its formalist portrayal of mediation it generally fails to consider the variety of ways mediation is practiced.<sup>8</sup>

A second substantial body of empirical research is oriented to policy and evaluation. Most of this research involves field studies of programs<sup>9</sup> addressing questions about the success (and sometimes failure) of mediation, and about acquisition and disposition of cases relative to alternative procedures. Findings suggest that settlement rates are generally high, particularly in the areas of labor<sup>10</sup>, divorce;<sup>11</sup> and small civil disputes.<sup>12</sup> Lower settlement rates are reported in complex environmental and international disputes.<sup>13</sup> Parties who report general satisfaction with the process tend to implement, and then comply with the agreements they

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6. See generally Fuller, *Mediation: Its Forms and Functions*, 44 S. CALIF. L. REV. 305 (1971); S. GOLDBERG, E. GREEN, & F. SANDER, *supra* note 1; J. MARKS, E. JOHNSON, & P. SZANTON, *DISPUTE RESOLUTION IN AMERICA* (1984); W. SIMKIN & W. FIDANDIS, *supra* note 3; SHEPPARD, *Third Party Conflict Intervention: A Procedural Framework*, in 6 RESEARCH IN ORGANIZATIONAL BEHAVIOR (B.M. Straw & L.L. Cummings eds. 1983).

7. Fuller, *supra* note 6, at 305.

8. Sarat, *The New Formalism in Disputing and Dispute Processing*, 21 LAW & SOC'Y REV. 709 (1987).

9. See McEwen & Maiman, *Small Claims Mediation in Maine: An Empirical Assessment*, 33 ME. L. REV. 237 (1981); W. FELSTEINER & L. WILLIAMS, *COMMUNITY MEDIATION IN DORCHESTER, MASSACHUSETTS* (U.S. Government Printing Office 1980); J. Roehl & R. Cook, *The Neighborhood Justice Centers Field Test: Final Evaluation Report* in NEIGHBORHOOD JUSTICE: ASSESSMENT OF AN EMERGING IDEA (R. Tomasic & M. Feely eds. 1982); T. KOCHAN, M. MORONI, R. EHRENBURG, J. BADERSCHNEIDER & T. JICK, *DISPUTE RESOLUTION UNDER FACTFINDING AND ARBITRATION: AN EMPIRICAL ANALYSIS* (1979); Buckle & Thomas-Buckle, *Placing Environmental Mediation in Context: Lessons from 'Failed' Mediations*, 6 ENVTL. IMPACT ASSESSMENT REV. 55 (1986).

10. Kochan & Jick, *The Public Sector Mediation Process*, 22 J. CONFLICT RESO. 209, 209-241 (1978); D. KOLB, *THE MEDIATORS* 9-13 (1983); Hiltrop, *Mediator Behavior and the Settlement of Collective Bargaining Disputes in Britain*, 41 J. SOC. ISSUES 83 (1985).

11. Pearson & Thoennes, *A Preliminary Portrait of Client Reactions to Three Court Mediation Programs*, 1 MEDIATION Q. 21, 22 (1984); K. KRESSSEL, *THE PROCESS OF DIVORCE: HOW PROFESSIONALS AND COUPLES NEGOTIATE SETTLEMENTS* 185-86 (1985).

12. Vidmar, *An Assessment of Mediation in Small Claims Court*, 41 J. SOC. ISSUES 139 (1985).

13. Buckle & Thomas-Buckle, *supra* note 9, at 55; J. BERCOVITCH, *SOCIAL CONFLICTS AND THIRD PARTIES: STRATEGIES OF CONFLICT RESOLUTION* 83 (1984).

reach.<sup>14</sup> Further, interviews with parties suggest that they find mediation yields agreements that are perceived as fairer and more equitable than those available through other means.<sup>15</sup> This literature draws much of its rationale from the policy questions formulated by those who advocate the extension of mediation into new areas.<sup>16</sup> Like the legal disputes model, most of this literature concentrates upon a comparison of mediation to its alternatives, and so ignores the considerable variation within mediation practice and the interrelationship between it and its alternatives.

Descriptions of process, with few exceptions,<sup>17</sup> have primarily been the province of practitioner manuals, laboratory simulations, and more recently, some field studies and experiments. Practitioners have contributed in growing numbers to the description of mediation process. Writing primarily from their own experience, practitioners nevertheless seek to abstract principles of practice that would have more general applicability.<sup>18</sup> As defined in these works, mediation entails a set of generic activities, in the sense that they are part of mediation in any situation. These works are intended to be prescriptive guides applicable in the widest variety of settings. What is omitted in them are the experiences of mediation, that is, the concrete interactions that occur in real circumstances and that are rich in detail. When described as techniques of intervention, mediation practices are abstracted from context, ignoring the connection between the activities described and the circumstances of their use.

Social psychological researchers also abstract mediation from its context of practice. These works typically investigate mediation through experimen-

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14. See W. FELSTINER & L. WILLIAMS, *supra* note 9; McEwen & Maiman, *Mediation in Small Claims Court: Achieving Compliance Through Consent*, 18 LAW & SOC'Y REV. 11, 16, 40-41, 44-47 (1984); J. ROEHL & R. COOK, *supra* note 9, at 100-101; Susskind & Ozawa, *Mediated Negotiation in the Public Sector*, 27 AM. BEHAV. SCI. 255, 256 (1983); Brett & Goldberg, *Grievance Mediation in the Coal Industry: A Field Experiment*, 37(1) INDUS. & LAB. REL. REV. 49 (1983); Pearson & Thoennes, *supra* note 11, at 21; K. KRESSEL, *supra* note 11, at 185-86; Buckle & Thomas-Buckle, *supra* note 9, at 55.

15. See J. THIBAUT & L. WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* 13-14, 17, 20-21 (1975); McEwen & Maiman, *supra* note 9, at 237; Susskind & Ozawa, *supra* note 14, at 255; Thoennes & Pearson, *Predicting Outcomes in Divorce Mediation: The Influence of People and Process*, 41 J. SOC. ISSUES 113, 120 (1985); Brett, *Commentary on Procedural Justice Papers*, in *RESEARCH ON NEGOTIATION IN ORGANIZATIONS* 84 (R. Lewicki, B. Sheppard & M. Bazerman eds. 1986).

16. See S. GOLDBERG, E. GREEN & F. SANDER, *supra* note 1, at 534-48.

17. See generally D. KOLB, *supra* note 10; Silbey & Merry, *Mediator Settlement Strategies*, 8 LAW & POL'Y 7 (1986); Forester, *Planning in the Face of Conflict: Negotiation and Mediation Strategies in Local Land Use Regulation*, AM. PSYCHOLOGICAL A. J. (Summer 1987).

18. See J. FOLBERG & A. TAYLOR, *supra* note 3; W. SIMKIN & N. FIDANDIS, *supra* note 3; C. MOORE, *supra* note 2; J. STULBERG, *TAKING CHARGE/MANAGING CONFLICT* (1987).

tation in the laboratory, and depict how and under what conditions particular mediator tactics aid the agreement-making process.<sup>19</sup> Testing hypotheses drawn from the technical, usually practitioner-authored writings, these studies seek to relate particular behaviors to mediation outcomes.<sup>20</sup> These studies have produced a wealth of insights that contribute to our understanding of the interactive dynamics of mediation. But their strength is also a limitation. In the interest of precision, simulations abstract the process from its context by focusing on individual relationships apart from the culture and social structures that shape them.

There is also a growing body of field work that tries to delineate what sort of techniques are most likely to produce agreements and under what conditions. Caucusing, for example, tends to result in more problem solving when parties are at each other's throat<sup>21</sup> in community settings, but apparently not in collective bargaining.<sup>22</sup> Setting an agenda, clarifying issues, shaping and making proposals and applying pressure on the parties to settle are generally correlated with settlement.<sup>23</sup> However, for most of these rules there are as many exceptions that are traceable to the dispute context, relationship between the parties, and the kinds of issues in dispute.<sup>24</sup> In comparing across settings, it is clear that what works in one may be wholly inappropriate in another, yet why this is so, is beyond the purview of most field studies.

19. See Rubin, *Experimental Research on Third Party Intervention Conflict: Toward Some Generalizations*, PSYCHOLOGICAL BULL. 379, 379-380 (1980).

20. See generally Carnevale, *Mediating Disputes & Decisions in Organizations*, in RESEARCH ON NEGOTIATION IN ORGANIZATIONS (R. Lewicki, B. Sheppard & M. Bazerman eds. 1986); Bartunek, Benton & Keys, *Third Party Intervention and the Bargaining Behavior of Group Representatives*, 19 J. CONFLICT RESO. 532 (1975); Johnson & Tullar, *Style of Third Party Intervention, Face-Saving and Bargaining Behavior*, 8 J. EXPERIMENTAL SOC. PSYCHOLOGY 319 (1972); Hiltrop & Rubin, *Effects of Intervention Mode and Conflict of Interest on Dispute Resolution*, 42 J. PERSONALITY & SOC. PSYCHOLOGY 665 (1982); Welton & Pruitt, *The Mediation Process: The Effects of Mediator Bias and Disputant Power*, 13 PERSONALITY & SOC. PSYCHOLOGY BULL. 123 (March 1987).

21. See Pruitt, McGillicuddy, Welton, Frey, Ippolito, *The Process of Mediation in Dispute Settlement Centers*, in MEDIATION RESEARCH (K. Kressel & D. Pruitt eds.) (1989).

22. Hiltrop, *supra* note 10, at 92.

23. See Donahue, Allen & Burrell, *Communication Strategies in Mediation*, 10 MEDIATION Q. 75, 86-88 (1985); S. Touval & W. Zartman, *supra* note 2, at 38; Zubek, Iocolano, Pruitt, *Mediator Behavior & Success*, in Community Mediation 17-19 (unpublished paper 1989); Wall & Schiller, *The Judge Off the Bench: A Mediator in Civil Settlement Negotiations*, in NEGOTIATING IN ORGANIZATIONS 179 (M. Bazerman & R. Lewicki, eds. 1983); Susskind & Ozawa, *supra* note 14, at 267.

24. Kressel & Pruitt, *A Research Perspective On Mediation of Social Conflict*, in MEDIATION RESEARCH: STUDIES IN THE PROCESS & EFFECTIVENESS OF MEDIATION (K. Kressel & D. Pruitt eds. 1989).

In sum, much scholarship in mediation, whether it is formal description, evaluation, field or laboratory study, is based, for the most part, on a concept of process that is defined either as a set of procedural characteristics or as clusters of tactics. Anthropological literature on disputing cross-culturally and the few field studies that have detailed some of the particulars of mediation as an alternative disputing process in the United States suggest a different conception.<sup>25</sup> These studies view mediation as a social process in which the meaning of a conflict and the facts of a case are indeterminate, and defined through the very process of resolution<sup>26</sup> which is itself structured by the setting in which it occurs.<sup>27</sup> In other words, it is through the use of dispute resolution procedures that the disputes are given meaning. They are not static events, but rather are transformed and framed as different parties with different interests get involved and try to assert these interests.<sup>28</sup>

Just as disputes are variable and subject to transformation, dispute processing procedures are not rigid in either form or structure. They are inconsistent, adaptive, and respond to and are transformed by the problems, parties, and situations encountered. Thus, mediation is practiced in different ways in different contexts and in response to different types of problems.<sup>29</sup> One such contextual dimension is the dispute resolution channel in which mediation occurs. In the United States, mediation has been introduced into already developed legal and quasi-legal institutions as an alternative. Where existing research tends to isolate mediation from its context, the strength of this approach is its explicit consideration of the relationship between mediation and the institution, the way conflicts are framed by the institutions, and the import of this for mediation.

Framing is relevant to mediation practice as both a mode of interpretation used to order situations and as a means to control definitions of that situation available to others. Interpretive frames enable mediators, and the

25. See THE DISPUTING PROCESS--LAW IN TEN SOCIETIES (L. Nader & H. Todd eds. 1978); Forester, *supra* note 17.

26. Mather & Yngvesson, *Language, Audience and the Transformation of Disputes*, 15 LAW & SOC'Y REV. 775 (1980-81).

27. P. GULLIVER, DISPUTES AND NEGOTIATIONS: A CROSS CULTURAL PERSPECTIVE 228-231 (1979); Felstiner, *Influences of Social Organizations on Dispute Processing*, 9 LAW & SOC'Y REV. 63, 74 (1974).

28. See Mather & Yngvesson, *supra* note 26; Felstiner, Abel & Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC'Y REV. 631 (1980-81); Yngvesson & Mather, *Courts, Moots and the Disputing Process*, in EMPIRICAL THEORIES ABOUT THE COURTS (K. Boyum & L. Mather eds. 1983).

29. See Gulliver, *On Mediators*, in SOCIAL ANTHROPOLOGY AND LAW (J. Hammett ed. 1977); Starr & Yngvesson, *Scarcity and Disputing: Zeroing-in on Compromise Decisions*, 2 AM. ETHNOLOGIST 553 (1975); THE DISPUTING PROCESS, *supra* note 25.



parties, to make a situation ordered and sensible. They focus attention on certain matters, give meaning to those issues, and so set direction for how they will be considered. Often practitioners are unaware of the frames they bring to situations and so do not see how they construct the reality within which they function.<sup>30</sup>

How conflicts between parties are framed also influences the ways third parties intervene. A limited number of frames, for example, rights, interests, and underlying needs or problems, are most relevant to mediation.<sup>31</sup> When matters in dispute are treated as issues of rights, they are taken to mean that one party or parties has a claim against another that is vindicated by a legal or other decisional remedy.<sup>32</sup> When disputes are framed as conflicts of interest, the situation is seen as one where parties desire or value the same scarce resource. Such situations can be resolved through compromise and trade-offs of demands.<sup>33</sup> In more recent prescriptive formulations, interests are defined as the underlying motivation for claims or behind positions in negotiation.<sup>34</sup> This formulation is akin to what Sheppard and his colleagues label an underlying problem frame.<sup>35</sup> Here the focus is not on what the parties demand as a matter of right, or on what they want to satisfy their interests, but on the underlying reason that the dispute has arisen in the first place. These reasons may be understood in terms of basic human wants and needs or as rooted in social and economic structures. If disputes are framed tracing problems back to their underlying cause, some suggest that it is possible to develop mutually satisfactory options for settlement.<sup>36</sup> However, observers of mediation often find that mediators explicitly narrow the frame from underlying problem to one of interests or rights in order to make the dispute more tractable.<sup>37</sup>

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30. D. SCHON, *supra* note 5, at 309-15.

31. See Sheppard, Blumenfeld-Jones & Roth, *Informal Thirdpartyship: A Program on Research on Everyday Conflict Intervention*, in *MEDIATION OF SOCIAL CONFLICT* (K. Kressel & D. Pruitt eds. 1988); SILBEY & SARAT, *DISPUTE PROCESSING LAW AND LEGAL SCHOLARSHIP* (Working Paper, Institute for Legal Studies, University of Wisconsin, 1988).

32. SILBEY & SARAT, *supra* note 31, at 71.

33. See Aubert, *Competition and Dissensus: Two Types of Conflict and Conflict Resolution*, 7 J. CONFLICT RESO. 26 (1963); SILBEY & SARAT, *supra* note 31.

34. R. FISHER & W. URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (1981); W. URY, J. BRETT & S. GOLDBERG, *supra* note 1, at 5.

35. Sheppard, Blumenfeld-Jones & Roth, *supra* note 31, at 19.

36. R. FISHER & W. URY, *supra* note 34, at 41-57; L. SUSSKIND & J. CRUIKSHANK, *supra* note 1, at 146-150.

37. D. KOLB, *supra* note 10, at 90; Silbey & Merry, *The Problem Shapes The Process: Interpreting Disputes*, in *Mediation & Court* 51 (unpublished paper 1987).

Frames are important not only in understanding how problems are interpreted, but also in the ways that they are mobilized to control available definitions of the situation.<sup>38</sup> The ways in which problems or issues in dispute are defined, the forms of argument and modes of discourse during discussion of the issues, the delineation of alternatives and range of possible settlements are all options mediators can use to create and sustain a particular interpretation of events and possibilities.<sup>39</sup> What I want to suggest, using grievance mediation as an example, is that the grievance procedure and arbitration process in unionized firms where mediation is used gives mediation in this context a particular character that is observed in the ways the parties and the mediator understand the process, frame the issues, consider the options, and move toward agreement.

### III. MEDIATION AND DISPUTE PROCESSING CHANNELS: THE CASE OF GRIEVANCES

In most fields where mediation is used, it is part of a hierarchy or channel of procedures. Labor and certain forms of commercial mediation typically follow on the heels of direct negotiation and precede an adjudicatory or arbitral step if agreement cannot be reached. In the labor context, for example, scholars have noted that mediation is really a continuation of collective bargaining,<sup>40</sup> and in divorce, that it is often confused with the counselling that may precede it.<sup>41</sup> Sometimes, mediation is a pause between violent actions among neighbors or neighboring countries and a hearing in a more formal setting; at other times, it is part and parcel of a legislative or judicial procedure to make rules or policy. Whatever its location, mediation is intended to be an alternative or complement to another already existing process or procedure for handling conflicts. This contextual relationship between mediation and the existing procedures suggests that there are considerable areas of overlap.

The relationship between mediation and other phases of a dispute processing hierarchy has been described in three major ways. Evaluation studies of mediation in small claims courts and in environmental and other public disputes note a kind of spillover effect.<sup>42</sup> Even if a dispute is not

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38. See E. GOFFMAN, *supra* note 5.

39. W. Pearce, S. Littlejohn & J. Rifkin, *Communication in Dispute Mediation Sessions: Institutional and Interactional Analysis* (unpublished paper 1987); D. KOLB, *supra* note 10, at 162-72.

40. C. STEVENS, *STRATEGY AND COLLECTIVE BARGAINING NEGOTIATIONS* 123 (1963).

41. L. RISKIN & J. WESTBROOK, *DISPUTE RESOLUTION & LAWYERS* 200 (1987).

42. McEwen & Maiman, *supra* note 14, at 46; Buckle & Thomas-Buckle, *supra* note 9, at 57-58, 72-73.

resolved in the mediation step, the fact that the parties have gone through mediation seems to affect their behavior when they move into direct negotiations or into litigation. Further, in complex disputes, it is likely that parties will pursue several avenues simultaneously. What happens in the different venues, insights gleaned about the issues and how the relationship develops, impact the ways the dispute is pursued in different channels. Thus, it may be more correct to see the relationship between different stages in the dispute resolution process as symbiotic, not alternatives or substitutes.

From another perspective, mediation and the procedure it replaces are not alternatives at all, but resemble each other in the manner by which they respond to similar problems. Silbey and Merry suggest that the nature of the interpersonal problems that people in neighborhoods bring to court lead to similarities in the ways that these problems are treated in the lower court and in mediation.<sup>43</sup> Specifically, they argue that the problems are not framed as legal disputes, but rather are viewed as complicated, socially-situated events that can only be resolved by adopting narrow definitions of the problems and through agreements based on a specified set of obligations and responsibilities. Further, they see commonalities in the process as well; both rely on negotiation as the primary mode of dealing with the issues, although the timing and structure of the negotiation may differ. Finally, they suggest that in both settings, the outcomes result in postponing the resolution of the dispute. The reason for the parallel processes in the court and in mediation arises because there is an organizational impetus, that permeates both settings, to respond to these cases and get them off the docket.

From a third perspective, similarities between mediation and its alternatives occur because mediation comes to replicate significant features of the formal, institutionalized framework it is supposed to replace. In a comparison of two ends of the mediation spectrum, in community mediation programs associated with the lower courts and in corporate mini-trials, Merry finds that each comes to resemble its counterpart in the legal system as well.<sup>44</sup> Some of the lines along which these two forms of mediation differ include the right to choose to mediate, to choose the mediator, the space and time allocated to the process, and the kind of time (work or non-work) during which mediation occurs. These symbolic differences arise because mediation replaces different services, and is framed in different institutionalized contexts. Thus, a mini-trial takes on the symbolic character and

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43. Silbey & Merry, *supra* note 37, at 53.

44. See Merry, *Varieties of Mediator Performance: Replicating Differences in Access to Justice* (unpublished paper 1988).

language of pre-trial negotiation between corporate lawyers, whereas community mediation is often akin to the treatment the parties would receive at the hands of judges and magistrates in lower courts.

These works suggest that to treat mediation as a particular form of dispute resolution and to investigate the advantages it has over alternatives overlooks some of the ways that different procedures become interwoven. The purpose of this analysis of grievance mediation is to consider some of the ways this blending occurs in the mediation process. In particular, the structure of mediation in the grievance context, the interpretive frames the mediators and the parties use to understand the issues, the language and forms of argument, and the possible outcomes are shaped by the preceding grievance steps and the possibility of arbitration that may follow. What this highlights is how dependent practice is on the surrounding institutional context.

#### IV. GRIEVANCE PROCEDURES

It is often said that the grievance procedure is at the very heart of a collective bargaining agreement because it provides workers and managers with a mechanism to interpret the contract in light of day-to-day operations.<sup>45</sup> Prior to the Wagner Act of 1935<sup>46</sup> and the growth of industrial unions and collective bargaining that it spawned, procedures to resolve work floor disputes were relatively uncommon. Indeed, it was not until collective bargaining agreements specified arbitration clauses, providing for an outside neutral, that grievance procedures became widespread.<sup>47</sup> This occurred during World War II when the National War Labor Board and its regional boards advocated the use of multi-step grievance procedures and arbitration as a means to settle disputes short of strikes.<sup>48</sup>

Grievance arbitration became part of national labor policy after the War through Section 203(d) of the Taft-Hartley Act (1947).<sup>49</sup> This section stated, "[f]inal adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising out of application of interpretation of existing collective bargaining agreements." In a series of decisions, specifically the Lincoln Mills case

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45. S. SLICHTER, J. HEALY & R. LIVERNASH, *THE IMPACT OF COLLECTIVE BARGAINING ON MANAGEMENT* 695 (1960).

46. Wagner Act (Labor Disputes) ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. § 151 (1982)).

47. N. CHAMBERLAIN & J. KUHN, *COLLECTIVE BARGAINING* 141-53 (1965).

48. A. THOMPSON, *THE GRIEVANCE PROCEDURE IN THE PRIVATE SECTOR* 4-6 (1974).

49. Taft Hartley Act, ch. 120, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. § 141 (1982)).

(1957) and the Steelworkers Trilogy (1960), the Supreme Court affirmed grievance arbitration as a quasi-judicial procedure appropriate for labor-management disputes and insulated arbitration awards from judicial review (except for procedural questions and other more recent exemptions).<sup>50</sup>

The multi-step grievance procedure with provision for arbitration is now a fixture in 98% of collective bargaining agreements. It provides for a first step in which a grievant (sometimes accompanied by a shop steward) discusses the problem orally with the supervisor. Failing agreement, the grievance is put in writing and submitted to a higher level of line management. In Step 2, a representative of the union and management meet and discuss the grievance. Typically, management's response is put in writing. In Step 3, the grievance is appealed to higher line management and/or the industrial relations department. Local or International representatives of the union are also involved in this step. If there is no agreement, then the union must decide whether to submit the grievance to binding arbitration, the fourth and final step.

Arbitration, like mediation, may take a variety of different forms. In the labor context, the term has had, historically, two meanings. One, the current connotation, is that of a quasi-judicial process in which the arbitrator renders a final and binding decision on an aspect of the contract that is contended by the parties. In contrast, some have described arbitrators as "labor relations physicians," who do not confine themselves solely to the immediate controversy, but rather adopt a broader mandate to help the parties with their relationships.<sup>51</sup> The evolution of the arbitrator's role from one that is more like mediation to its current quasi-judicial stance has followed the development of collective bargaining. Killingsworth and Wallen suggest that, during and after the War, as newly formed unions and industrial relations specialists experimented and learned the limits of the negotiation process and the contract it produced, an arbitrator who took a

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50. In the *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957), the Supreme Court took the position in disputes concerning the application of the collective bargaining agreement, that the proper forum for resolution is the grievance-arbitration procedure. In the *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960), the Court ruled that it should only determine arbitrability and if doubts exist, the case should be decided in favor of sending it to arbitration. In *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), the Court said that disputes over contract terms are assumed to be arbitrable unless they are specifically excluded. In other words, arbitration is viewed as a quid pro quo for giving up the strike. Finally, *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960), the Court said that courts should not review the substantive merits of the arbitrator's award as long as it based on the content of the agreement.

51. L. Fuller, *Collective Bargaining and the Arbitrator*, in *COLLECTIVE BARGAINING AND THE ARBITRATOR'S ROLE: PROCEEDINGS OF THE FIFTEENTH ANNUAL MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS* 24-29 (1962).

broad, problem-solving approach to disputes helped the parties learn how to deal with their disputes in a productive way.<sup>52</sup> However, they continue, as the parties became more experienced and as the body of past decisions, practices, and policies evolved, the scope of the arbitrator's discretion narrowed as well. The presumption is that the parties have the expertise to negotiate those disputes that are easily resolved, and that when they seek out an arbitrator, it is because they need the kind of binding decision the arbitrator promised.<sup>53</sup>

It is often observed that grievance procedures have a tendency to be overused and used for purposes other than those originally envisioned. Early experience suggested that it was quite easy for grievance procedures to become distressed.<sup>54</sup> Distressed procedures are ones in which the filing of grievances becomes so routine that the system becomes overloaded, thereby backing up cases waiting for arbitration; thus, serious issues are not resolved.<sup>55</sup> Procedures can become distressed for a variety of reasons. The parties can engage in "fractional bargaining," where both labor and management use the grievance procedure to attain what they were unable to gain in collective bargaining.<sup>56</sup> In situations where the environment and technology change rapidly, the alterations in working conditions that follow frequently lead to elevated grievance filings.<sup>57</sup> The enormity of changes occurring in industrial relations today, where many sacred principles of collective bargaining agreements have been frozen or altered considerably, means that the grievance procedure is likely to be a forum where the frustration with change may be expressed with detrimental consequences for

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52. Killingsworth & Wallen, *Constraint and Variety in Arbitration Systems*, in LABOR ARBITRATION -- PERSPECTIVES AND PROBLEMS: PROCEEDINGS OF THE SEVENTEENTH ANNUAL MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS 80 (1964).

53. T. KOCHAN, COLLECTIVE BARGAINING AND INDUSTRIAL RELATIONS 390 (1980). This is similar to the position of Merry and Silbey when they argue that by the time neighbors, lovers, and/or parents get to court, they have exhausted the negotiation possibilities. S. MERRY & S. SILBEY, WHAT DO PLAINTIFFS WANT? REEXAMINING THE CONCEPT OF DISPUTE 9, 154 (1984). What they are looking for is a decision, and they are thus often reluctant to continue their negotiations in mediation. In the case of worker grievances, however, it is clear from the evidence on grievance mediation that there is considerable interest in mediation prior to arbitration.

54. McKersie & Shropshire, *Avoiding Written Grievances: A Successful Program*, 35 J. BUS. 136 (1962).

55. Ross, *Distressed Grievance Procedures & Their Rehabilitae*, INST. OF INDUS. REL. 104 (Reprint 209 1963).

56. J. KUHN, BARGAINING AND GRIEVANCE SETTLEMENT 148 (1961).

57. See Peach & Livernash, *Grievance Initiation & Resolution: A Study in Basic Steel* (unpublished work, Harvard Graduate School of Business 1974).

labor efficiency and plant performance.<sup>58</sup> The grievance procedure, once the hallmark of due process systems in organizations, has more recently come under criticism for its excessive formalism and legalism, at least as compared with other employee voice-giving mechanisms now in use.<sup>59</sup>

Likewise, evaluations of the grievance arbitration procedure have also been mixed. On the one hand, arbitration is generally seen as preferable to the courts because of its informality and ability to take the culture of the shop floor into account. Indeed, it is sometimes taken as a model for use in other contexts.<sup>60</sup> Arbitration is interpreted as the *quid pro quo* for the strike during the term of the agreement and has contributed substantially to labor-management peace in many industries.<sup>61</sup> Despite these strengths, there continues to be dissatisfaction with many aspects of the process, particularly with the failure of the procedure to be speedy, inexpensive, and informal. Critics note that delays and costs make timely resolution of disputes an impossible goal. The time from a request for arbitration and the receipt of the decision can take anywhere from six to nine months and cost on the average, \$1500.<sup>62</sup> Adding to delays and the increasing legality of the process is arbitration's formality, which makes use of rules of evidence, examination and cross examination of witnesses, submission of written briefs, post hearing briefs, and written transcripts. The adjudicatory process that arbitration has become makes winning the end toward which the parties aspire.<sup>63</sup> And the win-lose framework often has unfortunate consequences in terms of the parties' satisfaction, perceptions about the fairness of the process, and willingness to comply with the decisions.

Criticism of grievance arbitration is not a new phenomenon and, over the years, a number of remedies have been proposed. Some are addressed to the pre-arbitration stages. These include short-term remedies such as "bargain days" in which backlogs are traded off, the use of union review boards to screen grievances<sup>64</sup> and encouraging oral handling of grievances.<sup>65</sup> Expedited arbitration, where less experienced arbitrators agree to hear cases according to less formal rules, in shortened time limits and with brief

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58. See T. KOCHAN, N. KATZ & R. MCKERSIE, *THE TRANSFORMATION OF AMERICAN INDUSTRIAL RELATIONS BASIC BOOK* (1986).

59. *Id.* at 83-87; C. HECKSCHER, *THE NEW UNIONISM* 168 (1988).

60. See Getman, *Labor Arbitration and Dispute Settlement*, 88 YALE L.J. 916 (1979).

61. A. THOMSON, *supra* note 48, at 6.

62. W. URY, J. BRETT & S. GOLDBERG, *supra* note 1, at 138.

63. *Id.* at 139.

64. Ross, *supra* note 55, at 28.

65. McKersie & Shropshire, *supra* note 54, at 144-145.

decisions that are not quoted as precedent, are used in certain industries.<sup>66</sup> While these procedures deal with criticisms concerning time, cost, and formality, there is still a sense that the adversary character of the process interferes with the parties' ability to solve their problems in mutually satisfactory ways and in ways that enhance, not erode, their relationships.<sup>67</sup>

One of the most promising innovations is the use of mediation as a new step in the grievance procedure prior to arbitration. While mediation is common in labor relations, it is usually in disputes over interests at the time of collective bargaining that parties use a mediator.<sup>68</sup> Grievance mediation has been used on a limited scale in Canada and in the public sector.<sup>69</sup> Often the procedure is criticized because of the presumption that the same neutral mediates and failing resolution, would then arbitrate. The "med-arb" role is complicated, and some critics believe the two processes will, by their very nature, interfere with each other. Information acquired during an unsuccessful mediation phase, may compromise the objectivity and integrity of the arbitration phase.<sup>70</sup> Likewise, the prospect of arbitration may inhibit the parties from confiding in the third party such that she can mediate the dispute.

In a new form of grievance mediation advocated by Stephen Goldberg and Jeanne Brett, based on an experiment they ran in the coal industry, the complications of this dual role are eliminated.<sup>71</sup> As they designed it, mediators who had extensive arbitration experience in the coal industry and who also had mediation skills would act as "mediator-advisors" as part of an extension of the final step in the grievance procedure before arbitration.<sup>72</sup> The mediator would try to mediate the dispute by encouraging the parties to shift their focus from the rightness or wrongness of their position and concentrate instead on the interests underlying these positions in the hope that the parties could reach a settlement that accommodated those interests. Failing this, the mediator would offer the parties an oral advisory arbitration opinion which, based on his or her best estimates, reflected the likely

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66. A. THOMSON, *supra* note 48, at 29-30.

67. See W. URY, J. BRETT & S. GOLDBERG, *supra* note 1.

68. D. KOLB, *supra* note 10, at 2.

69. Weiler, *The Role of the Labor Board as an Alternative to Arbitration*, PROCEEDINGS OF THE THIRTEENTH ANNUAL MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS 72 (1978); O'Grady, *Grievance Mediation Activities by State Agencies*, 31 ARB. J. 125-30 (1976).

70. Fuller, *supra* note 51, 29-37.

71. Brett & Goldberg, *supra* note 14; Brett & Goldberg, *Mediator-Advisors: A New Third Party Role*, in NEGOTIATING IN ORGANIZATIONS (M. Bazerman & R. Lewicki eds. 1983).

72. For an extensive description of the process, see Brett & Goldberg, *supra* note 14, at 51-54; Brett & Goldberg, *supra* note 71, at 165-75; W. URY, J. BRETT & S. GOLDBERG, *supra* note 1, at 134-68.



decision of an arbitrator if the case went to arbitration. If the parties did not resolve the grievance in mediation, they could go to arbitration, but the mediator could not act as an arbitrator during the arbitration step. The results of the initial experiment and the subsequent experience in coal and other industries have been impressive.<sup>73</sup> Many grievances are mediated and settlements in both coal and other industries run about 80%. Costs run between \$330 and \$450 per case, a figure that is roughly one-third that of arbitration. The saving is even larger when attorneys' fees are factored into arbitration, but not mediation. The time between request for mediation and the conference itself averages about 25 days as compared with four to six months for arbitration. Parties report satisfaction with the process, find compliance easier, feel that it has helped their relationships become more cooperative, and do not seem to have become overly dependent on it. That is, mediation does not inhibit serious negotiation at earlier steps.<sup>74</sup>

In the initial design of grievance mediation, it was the advisory opinion that was the cornerstone of the procedure. It promised the time and cost advantages.<sup>75</sup> Over time, however, the mediation part of the formula came to take on more prominence. Based on data collected by mediators participating in the coal experiment, this kind of mediated effort resulted in an 89% settlement rate at the time of mediation or shortly thereafter. Of those, 50% were classified as compromise settlements; 20% of the grievances were withdrawn; and advisory opinions were issued in 22%.<sup>76</sup> In the eleven grievance mediation cases that I have personally observed, eight settled in mediation, six in a compromise, and two by the union withdrawing its grievance. An advisory opinion was given in one case, but predictions about how the parties would fare in arbitration were made in all the cases. It is this link between what happens in mediation and the interweaving of the previous steps in the procedure and the possibility of arbitration as a future step that I shall consider in more detail.

This analysis of grievance mediation derives from the research I am currently doing on the practice of one of the mediators who worked with Brett and Goldberg in introducing the program into a growing array of industries. I am studying him at work, as well as conducting extensive interviews in order to write a "profile" of both him and his practice. I have thus far spent seven days in his company on mediation cases in three industries (coal, communications, and electric utility), "tailing" him on the

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73. See, Brett & Goldberg, *supra* note 14, at 54-69; Brett & Goldberg, *supra* note 71, at 167-73; W. URY, J. BRETT & S. GOLDBERG, *supra* note 1, at 134-68.

74. Brett & Goldberg, *supra* note 14, at 59-60.

75. W. URY, J. BRETT & S. GOLDBERG, *supra* note 1, at 138.

76. Brett & Goldberg, *supra* note 14, at 60.

cases, and debriefing him in the hall, over drinks and dinner. The grievance mediation work is only part of his professional life. He is committed, indeed imbued with a vision, about the potential of collaborative, problem-solving relationships between management and labor. To that end, he is heavily involved in training, conferences, presentations, and some pro bono consultation. When he mediates a grievance, it is against an agenda of innovation and change in labor-management relations, an agenda that is not usually shared by a grievant, and only occasionally by the leadership of the union and management involved.<sup>77</sup>

## V. MEDIATING GRIEVANCES: STEPS IN THE PROCESS

By the time a grievance reaches a mediator, it has already traveled through a number of prior procedural steps. The conflict that led to the grievance may have started out as an angry outburst in response to an order, or a feeling of being victimized in the face of change, or a misunderstanding about responsibilities. However, that conflict becomes phrased, through the steps in the grievance procedure, into a charge by an employee that a contract violation has occurred. As the various parties participate in each successive step, the dispute, whatever its initial source, comes to be framed as a matter of right or wrong under the contract. In the presentation the parties give to the mediator during their first meeting (usually joint), it is this "black-and-white" interpretation that prevails. The task of the mediator, at least as conceived by the practitioner I studied, is to alter that conception by trying to get the parties to understand the problem better so that they can resolve it in a way that meets their needs and interests. In other words, he wants to shift the locus of discussion from one of rights to one of interests and underlying problems.

This is a complicated task because the parties speak in the language of the grievance steps just past and a projected future step in arbitration. How the parties frame the issues, explain them to the mediator, present and argue their case are all processes that reflect their experience in the

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77. In some firms, Quality of Work Life and Employee Involvement Programs provide a parallel structure to the traditional collective bargaining and grievance procedure models. In these "managerialist" structures, old lines between managers and workers are blurred as employees participate in solving problems at the work place. These occasions, as well as other due process mechanisms (open door, speak out, ombudsmen) now supplement a grievance procedure and provide for input and complaints on a more ongoing basis. See C. HECKSCHER, *supra* note 59, at 158-76. Some argue that these structures are most appropriate for the kinds of collaborative approaches to problem solving envisioned by the mediator and that the grievance procedure with its formal and legal structure provides a consistency and set of precedents in the workplace that is important to maintain (Michelle Hoyman, personal communication, 1988).

grievance procedure. In many of the cases I observed, the grievance and arbitration frames dominated discourse in the mediation session. It is hard for the parties to shift the focus to interests or problem solving. Mediation becomes, in this kind of situation, largely a matter of assessing the quality of the case the parties can put before an arbitrator. This kind of talk dominates the proceeding in Case Number 1, *Above the Pothead*. But there are other occasions where the mediator is able to shift the parties' grievance and arbitration frame and work with them to consider ways to deal with the underlying problem that gave rise to the grievance in the first place. While the arbitration framework is still important in the second case, "Safety in the Mines," the parties' understanding of the issues and the resolution go considerably beyond what would likely be possible in arbitration.<sup>78</sup>

#### A. Case #1: *Above the Pothead*

Western Power and Light is an electric utility whose workers are represented by the Electrical Union. The mediation took place in convention rooms at a local motel. Some 18 people drifted in and out of the mediation session including a representative from the International Union, the local president, two district representatives, and the grievants and witnesses for all the cases that would be mediated that day. On the company side of the table and in the seats around the side of the room, three hierarchical levels of industrial relations management as well as the relevant supervisors were present.

The mediator opened the joint meeting with an introduction to the grievance mediation process: "This is an informal process designed to get the parties, whose understanding of the contract and relationships make them best suited to find a solution. We will have an open and frank discussion about the background of the dispute in a joint meeting and try to resolve it there. I may have to separate you so that we can try out different approaches. But all ideas will stay there. We hope that it can be resolved, but if no agreement is reached, according to your arrangement, I will advise you on how I think an arbitrator will rule. If you do go on to arbitration, nothing we discuss here will be used at that step."

According to common convention in arbitration, the moving party, usually the union, presents first. This occurred here as well. The union representation (UR) passed a copy of the grievance to the mediator. It stated that, "underground linemen should refrain from installing

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78. Both of these cases involve actual events and people. Names and places have been disguised to preserve the privacy of the parties.

switches above the pothead." The pothead is the cross bar on electrical poles and has represented a line of demarcation between underground and overhead workers. The mediator is referred to page 81 of the contract which defines work groups, the overhead and underground groups, copies of job specifications which show who does what job, and some time sheets. The import of this evidence, according to the UR, is that cable splicers (the underground group) work up to the pothead; they have neither the training nor the equipment to do the work above the pothead. The grievant and a witness are called and they support the claim that as far as they know, only the overhead workers work above the pothead. When the mediator questions them about their reasons for protecting this distinction, such as safety, skill, jurisdiction, politics, the UR reiterates the initial stance: cable splicers stop at the pothead.

The industrial relations manager (IR) states that the company's position is that management has the right to assign work as it sees fit, that the job descriptions which the union has approved and which have been referred to in arbitration, do not preclude such assignments, and that they can show many occasions where cable splicers worked above the pothead.

The mediator begins his caucus with the union by assessing their chances in arbitration. The results of this kind of case in arbitration, he says, are mixed. There are three reasons for this: (1) Proving past practice is very difficult. For every witness the union produces, the company can produce data that contradicts it. (2) Currently the practice is flexibly applied. In many sites, only overhead people work above the pothead. If you go to arbitration and lose, the company might apply the new provision across the board and you would lose what you currently have. And (3) arbitrators are reluctant to rule on jurisdictional issues within the union when the unit itself is not affected. The union argues that it is prevailing practice, that the company splits the paperwork (and shows an example) between overhead and underground crews. With some further discussion, the mediator asks them to consider what their best case in arbitration would be.

In his caucus with the management committee, he asks how arbitrators have ruled on these kinds of issues and whether they would apply an arbitrator's decision in all the facilities. The company responds that it is not sure how the managers would apply the decision, but that is not relevant now. They view this case as a grievance that they would win in arbitration.

In a final meeting with the union, the mediator paints a discouraging picture of its chances in arbitration. "I am reluctant to give you an advisory opinion on the past practice issues because the case depends

on what each side can demonstrate. However, I do not think that your objectives would be served by arbitration. By calling attention to the rule, you may create a problem. Take a look at what you have and what you may lose. It is becoming more difficult to win on internal jurisdiction cases unless there is damage to the unit as an institution. If you ask me, I suggest that you back away from this without prejudice. I get nervous; the risk on your side is greater than theirs."

The union withdraws the grievance without prejudice. It took about 2.5 hours to mediate *Above the Pothead*. From start to finish, with a few efforts by the mediator to refocus the issues, the case was more like an advisory arbitration than a mediation. In each stage, the language and forms of discourse took the form of case-making similar to what one might observe in an arbitration. This interweaving of arbitration and mediation can be observed in the singular way the problem is defined, in the unstated rules for how the process proceeds, in the case-making arguments used by each party and in the dominant concern with assessing the quality of the arbitration case.

### 1. Framing the Issue

At the start of each grievance mediation, the mediator receives a copy of the grievance and its disposition at each step. This initial framing of the issue is set by language in which the grievance is cast. In order to meet the contractual requirements for the earlier steps, the problem is presented in terms of contractual rights or custom transgressed by management. In this case, the claim is that certain groups perform specified work and others do not. This interpretation of the issue dominates the discussion throughout. Unstated in this frame are a host of potential interests and problems that could be considered and perhaps addressed in this setting but are not. On the part of the workers, these include fears of a reduced workforce and protecting jobs from becoming de-skilled; on the part of management, in times of enhanced competition, interests include a desire to deploy the workforce flexibly and efficiently. These are the issues the mediator discussed with me. The framing of the issues in terms of violation of contractual rights in preparation for the earlier steps and arbitration, however, makes it difficult for the mediator to refocus the discussion on these issues.

There are many reasons why it is difficult to shift the frame from rights to interests in the mediation. Sometimes the parties have an interest in keeping the issue narrowly defined. In one case, a grievant had filed a case over the allocation of overtime for welders. His claim was that because the company needed welding on an idle day shift, and he was a welder, he

should have had the opportunity to bid on the job. However, the company claimed that he had already worked that idle day on another shift and so denied the grievance. It turned out that what the grievant wanted was a return to his day-shift job as a welder. The company response was that was not what the grievance was about. It was not willing to consider the underlying issue because it was not the subject of the grievance. The union promised, in withdrawing the grievance, that it would refile another one in the near future that related more directly to the underlying issue.

At other times, reframing the grievance can run counter to other objectives that the parties have in grievance mediation. Just as parties learned to use arbitration for other purposes than it was originally intended, so too does the leadership on both the union and management side incorporate mediation into the political calculus.<sup>79</sup> Where union leaders have trouble screening grievances, or fearing duty of fair representation suits, mediation can serve the purpose of "chilling out" a troublesome union member. The leadership turns to the mediator to "tell it like it is." On the management side, industrial relations managers bring line management and others into the process so that, according to the mediator, they can see more directly the implications of their behavior. When it is these political purposes that are being pursued (and these are not always known to the mediator), any effort to reframe the issues are likely to be rejected. In another grievance with Western Power that concerned what job classification should do underwater work, the mediator tried to expand the focus from who should do the work to a consideration of how the parties could deal with the continuing problem of work assignments out of classification. His effort to create a task force to study the problem was rebuffed by the company representatives. He learned that the company, in an effort to bring grievances under control, brought this case to mediation soon after the incident occurred so that the line manager and shop stewards would face up to the implications of their actions. Further, by focusing on the reframed issue, the parties did not have an opportunity to negotiate about the narrower rights issue. What these examples suggest is that the rights frame developed in the grievance procedure and in preparation for arbitration may limit the kind of interest based negotiation the mediator envisions.

## 2. Arguing the Case

The mediation process as it unfolded in the *Pothed* case was one, especially on the union side, of arguing the case on its merits. The parties

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79. Kolb & Van Mannen, *Where Policy Studies Go Wrong: Mediation in the Public Sector*, 17 ADMIN. & SOC'Y 197, 205-12 (1985).

come to mediation with folders filled with documentation about the grievance. During the first joint meeting, the union argued its case, that assigning underground workers above the *pothead* is a violation of prevailing practice. In the service of that argument, the union produced documentary evidence---the contract, the job specifications, the time sheets---and witnesses. Likewise the company produced its evidence that the job descriptions say nothing that precludes the assignment. Testimony from the supervisor and the industrial relations manager stated that once they began to use new kinds of cable, an earlier bar on using underground workers no longer applied. Further, these witnesses said they have followed no consistent practice in assignments. Efforts by the mediator to probe for the reasons behind the arguments were usually met with a reiteration of the position.

Articulating a bargaining position is usually a first step in mediation, but in the Pothead case, arguing the case continues into the caucuses as well. In the caucus with the union, for example, the UR reiterates the case, showing the work schedules that split overhead and underground workers, challenging the company's contention that the practice of assigning underground workers above the pothead is common. "Where is the practice, where's their evidence, they can only show one underground guy who did it, and he's been dead for 17 years," said the UR.

In caucusing with the company, the mediator poses the question in terms of what can be done to resolve the issue. The response he gets is that the only possible resolution is for the union to withdraw the grievance. The IR manager claims that this case is not serious, that the company does assign underground workers but not that frequently, that it has the records to prove it, and that it has the right to do so. When the mediator says that the price for walking away from this may be another grievance, the IR manager says that the company would win in arbitration, that it has been successful with such cases in the past and further a loss would not change very much anyway.

The mediator wants to encourage the parties to discuss these issues according to the way they are experienced by the workers, the union, and management, but the representatives from union and management seem determined to argue their case, supported by more evidence and testimony. This conflict over objectives is rarely openly aired. There are occasions, (as described in the Case #2 below) however, when the mediator can shift the parties from argument to problem solving. What seems to make a difference in whether such efforts are successful is the degree of support the mediator receives in these efforts from the chief spokes persons on each side. There are union and management representatives who generally share the mediator's belief that problem-solving is preferred---perhaps not as many such representatives as a mediator might like. However, there are always

situations in which a spokes person will buy into the process. If one or the other of the chief spokes persons has a keen interest, (economic, political, or pragmatic,) in settling a case without one side or the other backing down completely, then there is a chance that the discussion can shift from arguing the case to solving a problem.

### 3. Assessing the Chances in Arbitration

The possibility of arbitration figures prominently in mediation. If the parties do not reach an agreement during the mediation, arbitration is the next formal step. It is always possible that the parties will settle prior to arbitration, in part, because they rethink their chances as a result of the mediation. The mediator's expert assessment of the quality of the case the parties can present to an arbitrator may be one of the triggers to this rethinking. While formal advisory arbitration opinions are not that common, assessing the chances in arbitration is. Brett and Goldberg find that in 79% of the cases the mediator *predicted* the possible outcome in arbitration.<sup>80</sup> With these single issue cases, this prediction or assessment of the quality of the case seems to be a critical element of the mediator's strategy.

In the *Pothed* case, the mediator organized his presentation to the union around arbitration. He began the caucus with the argument that its chances of winning were not good, and that the victory might be more of a loss, he concluded with the same argument. The themes he alluded to in making his argument included: the riskiness and uncertainty of arbitration decisions; the risk in the way management would apply the decision; the trends in arbitral decision-making on certain kinds of cases; the subjectivity of the data in making a case on past practice; the fact that the problem is more complicated than a simple decision can deal with; and finally, that the outcome, even if the union "won," would not serve its objectives.

In all eleven mediation cases I observed, the mediator discussed with at least one of the parties, typically both, their chances in arbitration. What is so interesting is that in eight of those eleven mediations, the mediator began this discussion within the first few minutes of the caucus with the union. That does not mean he was able to predict the outcome in each instance, but he was usually able to tell what kind of arbitration case the union would have to make and the kind of challenges it would face. Further, the themes such as uncertainty, risk, potential loss, subjectivity of the data, were similar in each of the cases.

Arbitration is an alternative to mediation. By discussing the quality of the case in rather pessimistic terms (and I never heard an optimistic

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80. Brett & Goldberg, *supra* note 14, at 59.



assessment) the mediator hopes to shift the attention of the parties to resolution possibilities in mediation. Sometimes the audience for the presentation is the grievant. The mediator was able to convince one grievant that even if he were successful in arbitration, he would still not succeed in getting his job back. At other times, the audience is a member of the committee on the union or management side who needs to be persuaded that its position is untenable. This can take time, as in the *Pothhead* case.

It is not always possible for the mediator to assess the quality of a case for arbitration. In cases where claims are hard to verify (i.e. where the grievant and the supervisor disagree about whether the worker performed union work, or where an electrician claims 10 hours pay because a mechanic was called in first, a violation of practice) the mediator told the parties he could not predict how they would fare in arbitration. It would depend on the kind of case and the evidence and testimony they could prepare for arbitration. These cases did not settle in mediation. The *Pothhead* case, because it was based on a violation of past practice, might have been hard to predict. It was not. First, the parties came prepared with some documentation and secondly, the other issue of intra-unit jurisdiction made it possible for the mediator to evaluate the case.

There is a curious irony here. When the parties do not have all the ingredients for arbitration, when they are not armed with at least some documentation and evidence, it is difficult for the mediator to assess the quality of their case, especially if it is based on past practice. Without that assessment, the kind of rethinking of their options that might occur does not, and so the chances for settlement in mediation may diminish. On the other hand, as the parties prepare as for a possible arbitration, they tend to act like they are actually in arbitration and proceed, undaunted to argue their case. It may be easier for the mediator to evaluate their case, but still it may be difficult for the parties to break out of the rights frame and argumentative tack they take in preparing for arbitration. Thus, it may be difficult to shift their attention from claims about the virtue of their position to the kind of compromises they need to make in mediation. Clearly, the potential for settlement is enhanced when the parties signal their interest, at the outset, in a problem-solving form of mediation. That is what happened in the following case.

#### *B. Case #2: Safety in the Mines*

This grievance concerned Rosie, an employee of the Underground Mine company and a member of the Mineworkers. The mediation took place in a local motel, using two suites to convene the meetings. There are some 14 people present. As the case begins, the District Representa-

tive (DR) presents the grievance: Rosie, the grievant, received a final written warning concerning excessive accidents. He produces a copy of the warning which states that "your accident rate is excessive and if it is not brought into line you will be fired." He then produces a copy of the employee's accident record which shows a series of muscle and back strains, specks in her eyes and other minor accidents. The DR states the issue here as one of fault. Based on a recent arbitration award, he claims, the company must prove that the employee is at fault if it takes disciplinary action. And according to him only one of the accidents was Rosie's fault.

The mine industrial relations manager (IR) presents the company's situation. He hands out the mine's work rules and calls the mediator's attention to Rule #4, the safety program which states that employees with unsatisfactory injury records face disciplinary action. The company's argument has several parts. One is statistical, an employee with Rosie's kind of injury record (25 in 9 years) has a high probability of incurring a serious future injury. Secondly, the company has followed progressive discipline. She has been counselled by her supervisor and received an earlier warning. Finally, the company cites an earlier arbitration award that predates the one cited by the union that states the company can warn employees about their accident record based on statistics, not fault. Responding to a question from the mediator, they discuss whether the company has to prove fault on each and every accident.

The mediator then shifts the discussion away from the arbitration awards. He begins to question the grievant about her working situation, and whether there are special conditions that contribute to her accident record. She has recently returned from a seven-month absence due to depression and has not had an accident since her return. She describes the pressure she is under because of the warning. Her co-workers are always saying: "We need to babysit Rosie so she won't get fired." At this point, the union asks to meet with the mediator.

In the separate caucus, the DR and the committee describe the situation in the mine and its poor safety record, the minimal safety training sessions, and the pressure Rosie is under. She has been the victim of a rape attempt that has gone unpunished despite claims to the contrary. She is assigned work that is too strenuous for her. The mediator, after listening to these problems, starts to shift the discussion to how they can deal with Rosie's specific situation and, more broadly, with people who have excessive accident records. After questioning the union members about courses in safety that might be available, he suggests a special on-the-job safety program and suggests that this may be a chance to break Rosie's cycle of accidents. The union agrees.

The mediator then calls two of the IR managers into the hallway to discuss a possible safety program. They begin by alluding to the first arbitration case, noting that it was Rosie who was the grievant. The mediator reports some of his discussion with the union about the safety situation in the mine. The IR managers suggest that the Safety VP, who is present, should hear what he has to say. After some discussion again about the arbitration awards and who has the right to do what, the mediator reports about the safety problems in the mine and asks them to consider some sort of rehabilitation program. Management agrees in principle to a program in which a safety supervisor will analyze Rosie's safety record and observe her at work, offering a program to help her work in a safer manner. They agree to institute this as a prototype for other employees with poor safety records. However, they are reluctant to retract the warning; they claim that the union is unlikely to arbitrate this case because of the issue of determining who is at fault on Rosie's accidents. "He (the DR) doesn't want to risk putting the principle of fault on the line with this case," says a member of the management team.

In a private meeting with the DR, the mediator suggests that the arbitration case he won, in which the company has to prove fault, has in fact created problems for him. "She is a terrible case. The arbitrator is unlikely to remove the warning letter and she might undermine the decision you currently have." The mediator suggests that they forget the arbitration awards and fault and instead respond to the joint program management has proposed even though the warning would remain in her file. After some further discussion, an agreement is reached. Rosie will have a safety program, the warning letter will remain in the file, but it does not mean that she will be fired if she has one more accident. Although the grievance was technically withdrawn, the mediation process resulted in a shift away from fault and who was right or wrong to a new understanding about the company and the union's responsibilities in safety matters.

One hour into this case, the mediator asked how many other cases were planned for that day. The IR manager said that this was the only case. This signal indicated that this was a special, not a routine case, that there was plenty of time to devote to this case and that the parties seemed to be committed to resolving it in a way that met the grievant and the company's interests. Thus, the parties quickly moved from framing the issue according to the original complaint and emphasized their concern with safety at the mine. Discussion about safety began in the joint meeting and was discussed in further detail in the union caucus.

The process also had a different flavor from that in the *Pothead* case. Both spokesmen met privately in the hallway with the mediator and gave him background information on the grievant and the situation. He had a feel early in the case for some of the interests of the parties. Each party began its presentation by arguing its case. Each presented extensive documentation and based its arguments on precedent established in the two arbitration awards. However, the leaders on each side quickly moved away from this stance. In caucus with the union, the IR and the mediator worked together to keep the team focused on the problem to solve, and not the accumulation of complaints against the mine manager.

Finally, the assessment of the arbitration possibilities figured quite prominently here. As the mediator assessed the situation, with a little help from the IR managers, he knew that this was a case the union did not want to take to arbitration. It had, according to the mediator, a decision in its pocket that had the most leverage if it was not used. The risk of losing this case and wiping out the advantage was an argument the mediator made to the union of which the IR was well aware. The poor safety record in this mine, it was the highest in the company, likewise made the company a little skittish about arbitration as well.

## VI. COMMENT AND CONCLUSION

Mediation is often defined in contrast to the legal or quasi-legal institutions or procedures for which it is supposed to be an alternative. In the context of grievance mediation, it is clear that the relationship between the grievance procedure, mediation, and arbitration is more complicated. The parties' experience with the prior steps in the grievance procedure and the possibility that arbitration may follow have an impact both on the way the issues are framed and the way the process is conducted. The mediator starts with an arbitration-like case and his or her challenge is to alter the parties' conceptions of what is possible. In doing so, there is as I suggested a dilemma. For certain kinds of cases, the more thoroughly prepared the parties are for arbitration, the more credibly the mediator can assess their chances in arbitration. This assessment can condition them for the work of mediation. However, in doing such preparation, it may be more difficult for them to shift their thinking from a defense of rights to negotiation on the basis of interests. This is the challenge for the mediator.

In several of the cases, the mediation took on many characteristics of arbitration. These cases are recognized by the ways the issues are defined, the forms of argument, and the reluctance of the parties to shift the focus. In these situations, the process takes on the character of an advisory arbitration even if a formal advisory opinion is not given. While there may be efficiency advantages to this kind of process, it is likely to perpetuate

many features of existing procedures. These include the focus on rights, not interests; on winning, not solving problems; on narrow issues, not broader problems and concerns. In this sense, the innovation may, like mediation in other systems, become more the servant of the status quo than the harbinger of change.

Such an evaluation may be too hasty. It is clear that just as the existing procedures influence mediation, what happens in mediation has direct and indirect spillovers into the larger system. Informal procedures are often criticized because they individualize problems that may be systemic.<sup>81</sup> Whatever its other limitations, the arbitration procedure does, in many cases, lead to beneficial systemic change on the basis of individual case decisions. There are indications from even these few cases that there are at least three ways in which grievance mediation has an impact on the larger industrial relations system.

First there are some direct implications. The mediator I studied is imbued with a belief in the potential of mutual problem solving in union-management relations. He would like to use as many of these occasions as possible to change the way union and management solve problems and interact with each other. Sometimes he is successful. In the mediation of the safety case, for example, the mediator and the key actors transformed a system that was oriented almost exclusively toward discipline on safety matters into an educational program that meets the interests of workers and the company. There will always be occasions when this kind of change will occur and they will benefit individuals and groups of workers.

Secondly, grievance mediation gives union leaders and industrial relations professionals occasions to interact. These interactions may occur off-line in decisions made on what cases to mediate (when mediation is not automatic) and on-line during the process itself. I have noted in an earlier study of mediation in collective bargaining how important team relationships are between chief negotiators.<sup>82</sup> While the relationships during the joint meetings could hardly be described as cordial, in separate sessions, among certain of those I observed, there is a collegiality that seems to translate into some concern with protecting the other's interests. Further, it is clear that achieving innovation through the grievance mediation mechanism requires behind-the-scenes agreements to try seriously. The evidence is that in the safety case, such an effort was agreed to in advance.

Finally, the process may result in systemic changes in some unexpected ways. The process is used for education by leaders on both sides of the

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81. See Abel, *The Contradictions of Informal Justice*, in *THE POLITICS OF INFORMAL JUSTICE* 1:290 (1982).

82. D. KOLB, *supra* note 10, at 113-134.

table. The numbers of people who drifted in and out (first-line supervisors, safety managers, human resource personnel, shop stewards, committee-persons and others) were exposed to a new procedure. But in addition, through the discussion of issues, no matter how they are framed, these people who work on the line together come to see something of how their actions are seen by others. [They can say through the voice of the *mediator* things they cannot say face-to-face.] The strategic use of this process for organizational, not necessarily grievance resolution, purposes is something we need to learn more about.

